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Notes

NLRB Determination of Incumbent Unions' Majority Status

A National Labor Relations Board bargaining order¹ remedying an employer's refusal to bargain with a purported representative of his employees² forecloses the employees' freedom to choose or to refrain from choosing a bargaining representative.³ The Supreme Court has therefore limited Board use of bargaining orders, when a union seeks initial recognition, to cases in which an employer's unfair labor practices preclude proper determination of a bargaining representative's majority status in a Board supervised election.⁴ The Court has also held that absent such practices, an election is the only required method for resolving majority status disputes in the initial recognition situation.⁵

While the Board has adopted this approach to determine the majority status of a union seeking initial recognition, it has rejected it in cases of an employer's refusal to bargain with an incumbent union, when that refusal is based on the union's loss of majority support.⁶ Prior to 1969 the Board treated employers' refusals to bargain with incumbent and

¹Section 10(c) of the National Labor Relations Act (NLRA) authorizes the NLRB "to take such affirmative action . . . as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c) (1976). The bargaining order was devised early in Board history as a remedy for unlawful refusals to bargain. *See, e.g.,* *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *NLRB v. P. Lorillard Co.*, 314 U.S. 512 (1942).

²Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5) (1976). Under section 9(a), however, only refusals to bargain with "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees" violate the Act. 29 U.S.C. § 159(a) (1976). An employer is prohibited from recognizing a minority union by § 8(a)(2) of the Act. 29 U.S.C. § 158(a)(2) (1976), *construed in* *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961).

³Section 7 of the NLRA, 29 U.S.C. § 157 (1976), guarantees employees the right to choose or to refrain from choosing a bargaining representative. A bargaining order forecloses exercise of the latter choice, and is thus particularly onerous where the employees have rejected the union in an election. *See Note, NLRB v. Gissel Packing Co.: Bargaining Orders and Employee Free Choice*, 45 N.Y.U.L. REV. 318, 320-21 & n.12 (1970).

⁴*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). *See* Christensen & Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions under the NLRA*, 37 U. CHI. L. REV. 411 (1970).

⁵*Linden Lumber Div., Summers & Co. v. NLRB*, 419 U.S. 301 (1974).

⁶*Wanda Petroleum*, 217 N.L.R.B. 376, 376 n.3 (1975); *Nu-Southern Dyeing & Finishing, Inc.*, 179 N.L.R.B. 573, 573 n.1 (1969), *enforced in part*, 444 F.2d 11 (4th Cir. 1971).

recognition-seeking unions similarly, and issued a bargaining order on an employer's failure to establish a "good faith doubt" of union majority status in unfair labor practice proceedings.⁷ The Board's change in policy in the initial recognition situation was based on the greater reliability and speed of employee elections.⁸ While these considerations are also important in the incumbency situation, the Board has been reluctant to articulate significant differences between the two situations to justify its retention of a test of an employer's good faith doubt in the incumbency situation alone. The resulting confusion has led to conflict, excessive litigation and violation of the fundamental policies of the National Labor Relations Act (NLRA). This note will examine the policy bases and distinctions on which disparate treatment of the two situations is grounded and will advise rejection of a doubt-based test when an employer refuses to bargain with an incumbent union, in favor of a test which seeks the best available objective indicia of actual majority support.

THE INITIAL RECOGNITION STANDARDS

The Good Faith Doubt Test and Its Repudiation

In *Joy Silk Mills, Inc.*,⁹ an employer refused to bargain after union authorization cards were signed by a majority of his employees. The Board found that the employer's unlawful anti-union activity following the refusal evidenced a bad faith desire to gain time in which to dissipate the union's claimed majority, and issued a bargaining order.¹⁰ This focus on the employer's state of mind led to creation of two categories of section 8(a)(5) violations: first, as in *Joy Silk*, cases in which independent unfair labor practices¹¹ subsequent to the refusal served as a badge of bad

⁷Initial recognition situation: *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *Aaron Bros.*, 158 N.L.R.B. 1077 (1966); Note, *NLRB v. Gissel Packing Co.: Bargaining Orders and Employee Free Choice*, 45 N.Y.U.L. REV. 318, 321-32 (1970). Incumbency situation: *Bartenders, Hotel, Motel, and Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651 (1974); *Nu-Southern Dyeing and Finishing, Inc.*, 179 N.L.R.B. 573, 573 n.1 (1969), *enforced in part*, 444 F.2d 11 (4th Cir. 1971); *Terrell Machine Co.*, 173 N.L.R.B. 1480, 1480-81 (1969), *enforced*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); *Celanese Corp. of America*, 95 N.L.R.B. 664 (1951); see *Morales, Presumption of Union's Majority Status in NLRB Cases*, 29 LAB. L.J. 309 (1978); *Seger, The Majority Status of Incumbent Bargaining Representatives*, 47 TUL. L. REV. 961, 978-89 (1973).

⁸*Linden Lumber Div., Summers & Co. v. NLRB*, 419 U.S. 301, 304-07 (1974). See notes 24-30 & accompanying text *infra*.

⁹85 N.L.R.B. 1263 (1949), *enforced as modified*, *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

¹⁰*Id.* at 1264-65.

¹¹"Independent unfair labor practices" will be used in this note to describe employer violations of § 8(a)(1) - (4) of the NLRA. Such independent unfair labor practices may be seen as colorative of the refusal to bargain, as in the *Joy Silk* test, or evaluated as to the extent to which they impair NLRB elections, as in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

faith; second, cases in which the employer's lack of a reasonable explanation for his refusal to bargain itself implied bad faith.¹²

Amid widespread criticism¹³ of the *Joy Silk* doctrine, the Board eliminated the latter category of violation¹⁴ and limited the finding of bad faith to instances in which independent unfair labor practices were "of such a character as to reflect a purpose to evade an obligation to bargain."¹⁵ This limitation failed to quell the rising tide of dissatisfaction with the *Joy Silk* employer state-of-mind test;¹⁶ some twenty years after the formulation of the *Joy Silk* good faith doubt test, the Supreme Court barred further inquiry into the employer's state of mind in *NLRB v. Gissel Packing Co.*¹⁷ The *Gissel* opinion expressly jettisoned the good faith doubt test, and premised issuance of a bargaining order on the presence of independent unfair labor practices sufficiently severe to destroy the "laboratory conditions" necessary for a fair election.¹⁸ The Court emphasized the shift in focus from the employer's state of mind to the effect of the unfair labor practices on the employee's free choice, by creating a hierarchy of unfair labor practices by which the appropriateness of a bargaining order might be measured.¹⁹

The shift from a search for employer doubt culminated in *Linden Lumber Division, Summers & Co. v. NLRB*.²⁰ In *Linden*, the Supreme Court held that unless an employer has engaged in unfair labor practices sufficient to violate the *Gissel* standards, an election is the sole ap-

¹²See, e.g., Fred Snow, 134 N.L.R.B. 709 (1961), *enforced*, Snow v. NLRB, 308 F.2d 687 (9th Cir. 1962).

¹³Note, *Refusal-to-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387, 397-401 (1966); Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434 (1965), cited in Affeldt, *Bargaining Orders Without an Election: The National Labor Relations Board's "Final Solution"*, 57 KY. L.J. 151, 154 (1969).

¹⁴Aaron Bros., 158 N.L.R.B. 1077 (1966); John P. Serpa, Inc., 155 N.L.R.B. 99 (1965).

¹⁵Aaron Bros., 158 N.L.R.B. 1077, 1079 (1966).

¹⁶Affeldt, *supra* note 13; Browne, *The Labor Board Unsettles the Scales*, 42 NOTRE DAME LAW. 133, 145-46 (1966); see NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1969).

¹⁷395 U.S. 575 (1969).

¹⁸*Id.* at 612.

¹⁹*Id.* at 613-16. The problems of the initial recognition situation were not completely resolved by adoption of the *Gissel* standards. Three major areas of controversy remain: (1) it is unclear how the Board places a given case within a given *Gissel* category, Christensen & Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions under the NLRA*, 37 U. CHI. L. REV. 411, 445-47 (1970); see, e.g., General Stencils, 178 N.L.R.B. 108 (1969), *enforced in part*, 438 F.2d 894 (2d Cir. 1971); (2) it is unclear when, if appropriate, a bargaining order should become effective; and (3) whether it should apply retroactively or prospectively in a given case. Trading Port, Inc., 219 N.L.R.B. 298 (1975); Walther, *NLRB Bargaining Orders: A Problem Solving or Ivory Tower Approach to Labor Law*, 17 WASHBURN L.J. 1, 12-19 (1977). Nonetheless, the current approach, by focusing on the impact of an employer's unfair labor practices on his employees' right to choose a bargaining representative rather than the employer's mental state, is more consistent with the underlying policy of preserving employees' free choice. Note, *NLRB v. Gissel Packing Co.: Bargaining Orders and Employee Free Choice*, 45 N.Y.U.L. REV. 318, 336 (1970).

²⁰419 U.S. 301 (1974).

propriate method for determination of majority status in the initial recognition situation.²¹

Reasons for the Shift

This retreat from determination of majority status in unfair labor practice proceedings and substitution of the election process has been based on a number of policy factors: First, a perceived difficulty in inferring an employer's state of mind has led to reliance on more objective indicators.²² Further, there has been increasing realization that an employer's state of mind is irrelevant to the actual majority status of the bargaining representative.²³ Second, the relative speed of the election process leads to earlier resolution of disruptive disputes.²⁴ Third, the greater reliability of the election process reduces the chance of fastening an unwanted union on employees and employers.²⁵ Fourth, it gives the NLRB staff a faster, simpler set of procedures for determining majority status.²⁶ Fifth, it removes the parties from the adversary roles of the unfair labor practice litigation, where prolonged confrontation can lead to continued disharmony after Board disposition of the dispute.²⁷

By focusing the attention of the decisionmaker on the actual majority status of the bargaining representative, emphasizing speed and accuracy, and promoting greater certainty as to standards and procedures, the current approach promotes industrial peace by encouraging party self-regulation and informal resolution of disputes. In contrast, Board procedures and policies in the incumbency situation fail to resolve the central issue of actual majority status, and almost seem designed to engender uncertainty and dispute.

²¹*Id.* at 310.

²²*Id.* at 307; cf. Seger, *supra* note 7, at 984 (analysis of good faith doubt test in the incumbency situation); Christensen, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968) (motive and intent in determination of violations of § 8(a)(3) and § 8(a)(2) of the NLRA).

²³Seger, *supra* note 7, at 984-89.

²⁴*Linden Lumber Div., Summers & Co. v. NLRB*, 419 U.S. 301, 306-07 (1974).

²⁵See *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 596, 602 & n.19 (1969); *Brooks v. NLRB*, 348 U.S. 96, 100 (1954); *NLRB v. Logan Packing Co.*, 386 F.2d 562, 564-66 (4th Cir. 1967); Browne, *The Labor Board Unsettles the Scales*, 42 NOTRE DAME LAW. 133, 146 & n.104 (1966). While the dissent in *Linden*, *supra* note 5, points out the statutory provision for recognition of unions designated by means other than an election, the *Linden* majority found such informal evidence of majority insufficiently compelling to force an employer's recognition. While the effect of the new rule is to make it more difficult for unions to organize nonunion establishments, see A. COX, LAW AND THE NATIONAL LABOR POLICY 41-42 (1960); Note, *Refusal to Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387, 405 (1966), this is justified by the greater reliability of the election process, and its increased protection of employees' free choice.

²⁶See A. COX, *supra* note 25, at 41.

²⁷See Wolkinson, *The Remedial Efficacy of NLRB Remedies in Joy Silk Cases*, 55 CORNELL L. REV. 1, 24 (1969).

THE INCUMBENCY STANDARDS

Under current Board rules an incumbent union is irrebuttably presumed to have majority support for one year after commencement of a collective bargaining relationship.²⁸ Any refusal by the employer to bargain during this year violates section 8(a)(5), and can precipitate a bargaining order.²⁹ On expiration of the protective year, the presumption can be rebutted by an employer's demonstration in unfair labor practice proceedings either that the union no longer has a majority, or that the employer's refusal is based upon reasonable, serious doubt of the union's majority.³⁰

The Reasonable Doubt Test

A two-pronged test, first formulated in *Celanese Corp. of America*,³¹ determines whether the employer's doubt is "reasonable": the issue must be raised in the absence of independent unfair labor practices, and there must be sufficient objective³² considerations to provide reasonable grounds for the doubt.³³ An employer who satisfies both prongs of the test is determined not to have violated section 8(a)(5) and has no further obligation to bargain.³⁴ Thus the incumbency test, which focuses on the employer's state of mind, is no more than the old *Joy Silk* initial recognition test.³⁵ The problems of focus, reliability and procedural efficiency which led to its rejection in the initial recognition situation remain troublesome in the incumbency situation.

The major and most fundamental problem of the current Board approach to incumbency questions is its focus on the essentially collateral issue of an employer's doubt.³⁶ The current Board test may relieve an

²⁸Brooks v. NLRB, 348 U.S. 96 (1954).

²⁹There are three extraordinary exceptions to this rule: (1) where the certified union has dissolved or become defunct; (2) where as the result of a schism the entire membership of the union has transferred its affiliation to another union; (3) where the size of the bargaining unit has fluctuated radically within a short time. Brooks v. NLRB, 348 U.S. 96, 98-99 (1954).

³⁰Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n, 213 N.L.R.B. 651, 651, 653 (1974); see Morales, *supra* note 7, at 310.

³¹95 N.L.R.B. 664 (1951).

³²Considerations similar to those leading to the abandonment of the subjective element in the initial recognition doctrine have resulted in an "objectification" of the formerly subjective *Celanese* test. Laystrom Mfg. Co., 151 N.L.R.B. 1482, 1484 (1965), *enforcement denied*, 359 F.2d 799 (7th Cir. 1966); see NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 299-300 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2847 (1979).

³³Terrell Machine Co., 173 N.L.R.B. 1480, 1480-81 (1969), *enforced*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970), *quoted in* Pioneer Inn Assoc., 228 N.L.R.B. 1263 at 1265 (1977); see Morales, *supra* note 7, at 310.

³⁴NLRB v. Dayton Motels, Inc., 474 F.2d 328 (6th Cir. 1973); NLRB v. Ben Duthler, Inc., 395 F.2d 28 (6th Cir. 1968); Faye Nursing Home, Inc., 215 N.L.R.B. 658 (1974)(dictum); United Supermarkets, Inc. 214 N.L.R.B. 958, 960 (1974)(Miller, Chairman, dissenting opinion).

³⁵See notes 9-12 & accompanying text *supra*.

³⁶NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1969); see Seger, *supra* note 7, at 984.

employer of the duty to bargain, even upon demonstration of the union's actual majority.³⁷ Such a result directly conflicts with the stated policy of the NLRA, which requires that an employer bargain with an employee representative designated by an actual majority.³⁸ This misguided inquiry into employers' doubt has led to procedural confusion and instability in two areas: first, the quantum of evidence sufficient to provide reasonable grounds,³⁹ and second, the effect of such evidence.⁴⁰

Sufficiency of Evidence of Employer Doubt

The amount of evidence sufficient to establish a reasonable doubt and thus overcome the presumption of majority is one source of uncertainty under the current Board approach. The objective criteria are often ambiguous.⁴¹ Furthermore, assessing the evidence in light of the circumstances of each case⁴² leads to conflicting results in factually similar situations,⁴³ and makes it difficult to determine which evidence is dispositive of a given case.

The courts of appeals are in conflict on the question of sufficiency. A number of circuits require "clear, cogent and convincing evidence"⁴⁴ to establish an employer's reasonable doubt. This standard in effect means an employer cannot establish loss of majority through evidence of conduct sufficient to raise an inference of majority loss, but must demonstrate actual loss of majority (which is generally beyond his power⁴⁵), or express repudiation by the employees.⁴⁶ The remainder of the

³⁷"[E]ven if in fact the Union actually represented a majority of the employees in the bargaining unit, the Company would still have a complete defense if it had a good faith doubt about such representation. *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968)." *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 332 (6th Cir. 1973); see *Faye Nursing Home, Inc.*, 215 N.L.R.B. 658 (1974).

³⁸29 U.S.C. §§ 158(a)(5), 159(a) (1976).

³⁹*NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978); see *Morales*, *supra* note 7, at 310-12.

⁴⁰See *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651, 656 (1974) (Kennedy, Member, dissenting opinion).

⁴¹*Compare, e.g.*, *Peoples Gas System, Inc.*, 238 N.L.R.B. No. 143, 99 L.R.R.M. 1423 (Sept. 29, 1978), *appeal docketed*, No. 78-2330 (D.C. Cir. Dec. 28, 1978) (forty percent decline in dues checkoffs insufficient to support reasonably based doubt) *with* *Lodges 1746 & 743, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 416 F.2d 809, 812 (D.C. Cir.), *cert. denied*, 396 U.S. 1058 (1969) (sharp reduction in checkoff basis for good faith doubt) *and* *Wooster Brass Co.*, 80 N.L.R.B. 1633 (1948) (same); *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 307 (9th Cir. 1978) (union inactivity and failure to process grievances insufficient evidence) *with* *NLRB v. Nu-southern Dyeing & Finishing, Inc.*, 444 F.2d 11 (4th Cir. 1971) (union inactivity among factors justifying good faith doubt) *and* *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 547 (7th Cir. 1970) (same).

⁴²See, *e.g.*, *Celanese Corp. of America*, 95 N.L.R.B. 644, 672 (1951).

⁴³See note 41 *supra*.

⁴⁴*NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978); *NLRB v. Retired Persons Pharmacy*, 519 F.2d 486, 489-90 (2d Cir. 1975); *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975); *Ref-Chem v. NLRB*, 418 F.2d 127, 130 (5th Cir. 1969); *Petitioner's Brief for Certiorari* at 14-16, *Vegas Vic, Inc. v. NLRB*, 434 U.S. 818 (1978).

⁴⁵See notes 49-51 & accompanying text *infra*.

⁴⁶See *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974).

circuits have retained the less stringent, but vague, Board standard of "reasonable basis."⁴⁷

The Effect of Production of Sufficient Evidence

Under the current Board approach an employer's production of evidence sufficient to establish a reasonable doubt is a complete defense to the unfair labor practice charge, and the employer has no further obligation to bargain.⁴⁸ In *Stoner Rubber Co.*⁴⁹ the Board seemed to modify the *Celanese* test, and held that inasmuch as actual proof of majority is so peculiarly within the special competence of the union, production by the employer of evidence sufficient to cast "serious doubt" on the union's majority status would cause the presumption of majority to lose its force. The burden of proving actual majority on the date of the refusal to bargain would then shift to the General Counsel, representing the union.⁵⁰ Although the *Stoner* test has been adopted by several circuits,⁵¹ the Board has repeatedly rejected further adherence to it.⁵²

The uncertainty generated by these conflicting procedures and standards of review is conducive neither to stable industrial relations nor to protection of employees' free choice of a bargaining representative. The Board's complicated and shifting standards also lead to problems in application by administrative law judges⁵³ and to prolonged litigation.⁵⁴

⁴⁷*NLRB v. King Radio Corp.*, 510 F.2d 1154, 1156 (10th Cir.), *cert. denied*, 423 U.S. 839 (1975); *Automated Business Systems v. NLRB*, 497 F.2d 262, 270 (6th Cir. 1974); *Retail, Wholesale and Dep't Store Union v. NLRB*, 466 F.2d 380, 393 (D.C. Cir. 1972); *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); *NLRB v. Frick Co.*, 423 F.2d 1327, 1331 (3d Cir. 1970); *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (8th Cir. 1969); *Petitioner's Brief for Certiorari* at 14-15, *Vegas Vic, Inc. v. NLRB*, 434 U.S. 818 (1978).

⁴⁸*See note 37 supra.*

⁴⁹123 N.L.R.B. 1440 (1959).

⁵⁰*Id.* at 1445.

⁵¹*Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974); *Orion Corp. v. NLRB*, 515 F.2d 81 (7th Cir. 1975); *AIW, Local 289 v. NLRB*, 476 F.2d 868 (D.C. Cir. 1973); *NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970); *Petitioner's Brief for Certiorari* at 11-18, *King Radio Corp. v. NLRB*, 423 U.S. 839 (1975) (employer's reasonable doubt shifts burden of proving majority to General Counsel). *But see* *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978); *NLRB v. Retired Persons Pharmacy*, 519 F.2d 486 (2d Cir. 1975); *NLRB v. Leatherwood Drilling Co.*, 513 F.2d 270 (5th Cir.), *cert. denied*, 423 U.S. 1016 (1975); *NLRB v. King Radio Corp.*, 510 F.2d 1154 (10th Cir.), *cert. denied*, 423 U.S. 839 (1975); *Terrell Machine Co. v. NLRB*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084 (8th Cir. 1969) (reasonable doubt a complete defense).

⁵²*E.g.*, *United Supermarkets, Inc.*, 214 N.L.R.B. 958, 959 & n.10 (1974); *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651, 654 n.21 (1974). *But see* *Taft Broadcasting*, 201 N.L.R.B. 801 (1973).

⁵³*See, e.g.*, *Peoples Gas System, Inc.*, 238 N.L.R.B. No. 143 slip op. at 4 n.6, 99 L.R.R.M. 1423, 1424 n.6 (Sept. 29, 1978), *appeal docketed*, No. 78-2330 (D.C. Cir. Dec. 28, 1978); *Wanda Petroleum*, 217 N.L.R.B. 376 (1975); *Faye Nursing Home*, 215 N.L.R.B. 658 n.1 (1974).

⁵⁴*See, e.g.*, *Peoples Gas System, Inc.*, 238 N.L.R.B. No. 143, 99 L.R.R.M. 1423 (Sept. 29, 1978), *appeal docketed*, No. 78-2330 (D.C. Cir. Dec. 28, 1978). Five years after the

THE PRESUMPTION OF MAJORITY AND ITS RATIONALE

Bases of the Presumption of Majority

The presumption of continuing majority is an important factor in the Board's disparate treatment of the incumbency and initial recognition situations. Presumptions are created for a variety of reasons, three of which are relevant here: probability, fairness, and social and economic policy.⁵⁵

The early justifications for the presumption of continuing majority were based on probability: prior existence of majority status is some indication of its probable continuance at a later date.⁵⁶ Proponents of the *Stoner* test, which allocates to the employer only the burden of going forward to meet the presumption, contend that probability is the sole basis of the presumption.⁵⁷ This factor alone, however, does not distinguish the incumbency from the initial recognition situation, in which courts have been extremely reluctant to issue bargaining orders without such informal demonstration of prior majority support as a strike or signed authorization cards.⁵⁸

The second basis for presumptions, fairness, places upon the party controlling the evidence the burden of proving its position.⁵⁹ As the Board has conceded,⁶⁰ and commentators⁶¹ and courts⁶² agree, such proof of majority is more accessible to the union. Therefore, this consideration is not a valid basis for the presumption of continuing majority either.

The third basis for the creation of a presumption is the implementation of social and economic policies,⁶³ and it is upon this basis that the validity of the Board's presumption must ultimately rest. Chief among the policies is the preservation of stable, existing bargaining relationships:⁶⁴

employer's refusal to bargain, the majority status of the union remains to be resolved, despite an unchallenged election in which employees voted to oust the union.

⁵⁵C. MCCORMICK, EVIDENCE 806-07 (2d ed. E. Cleary 1972); see Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11-13, quoted in J. WEINSTEIN & M. BERGER, EVIDENCE § 300[03], at 13-14 (1978).

⁵⁶*E.g.*, NLRB v. Whittier Mills Co., 111 F.2d 474, 478 (1940).

⁵⁷Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n, 213 N.L.R.B. 651, 656 & n.26 (1974)(Kennedy, Member, dissenting).

⁵⁸See *Automated Business Systems v. NLRB*, 497 F.2d 262, 267 n.1 (6th Cir. 1974).

⁵⁹C. MCCORMICK, *supra* note 55, at 806-07.

⁶⁰*Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1445 (1959). But see *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651, 653-54 (1974).

⁶¹R. GORMAN, BASIC TEXT ON LABOR LAW 110, 113-14 (1976); Seger, *supra* note 7, at 982-83; 988.

⁶²See note 51 *supra*.

⁶³See Cleary, *supra* note 55.

⁶⁴NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 303-04 (9th Cir. 1978); *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 490 (2d Cir. 1975); *NLRB v. Frick Co.*, 423 F.2d 1327, 1330-31 n.6 (3d Cir. 1970)(citing with approval *Aaron Bros. Co.*, 158 N.L.R.B. 1077, 1079

having already established its majority once, the union should not have to do so again.⁶⁵ But the Board has not analyzed its assumption⁶⁶ that industrial stability will result; it merely resorts to ritualistic incantation of the phrase.⁶⁷

The quest for industrial stability was important in the passage of the NLRA,⁶⁸ which established certain preferred mechanisms to effectuate that goal: the protection of free choice of bargaining representatives and the encouragement of free collective bargaining.⁶⁹ Were it not for the countervailing effect of these factors, the Board could achieve industrial stability through ex parte creation of bargaining relationships, and imposition of bargaining agreements or contract terms, as it saw fit.⁷⁰ The balance of free choice and stability in the incumbency situation is a difficult one, but the Board has never gone beyond recognition of the dilemma and decided to what extent industrial stability can override employee free choice.⁷¹ The few courts of appeals which have addressed this issue have reached conflicting results.⁷² The mere assertion that industrial stability is fostered by a bargaining order, without an evaluation of countervailing considerations of employee free choice, will not suffice as a basis for the presumption. Moreover, the effect of the presumption on the preservation of industrial peace must be evaluated.

Concededly, the presumption is likely to preserve the status quo; however, the inference that preservation of the status quo is conducive to the industrial stability envisioned by the NLRA is far from compelling. Typically the union has been inactive for months or years prior to an employer's refusal to bargain.⁷³ While this type of bargaining relation-

n.8 (1966)(dictum)); *Pioneer Inn Assoc.*, 228 N.L.R.B. 1263, 1265 (1977); *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651, 651 (1974); *Terrell Machine Co.*, 173 N.L.R.B. 1480, 1480-81, *enforced*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); Comment, *Daisy's Originals, Inc. v. NLRB: New Restrictions on the Use of Bargaining Orders under the National Labor Relations Act*, 122 U. PA. L. REV. 207, 215-16 (1973); *Seger*, *supra* note 7, *passim*; Comment, *Employee Repudiation of Bargaining Representatives: An Appraisal of Existing Restrictions*, 66 YALE L.J. 223, 224 (1956).

⁶⁵*NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 300 (9th Cir. 1978).

⁶⁶E.g., cases cited note 64 *supra*.

⁶⁷See Comment, *Employee Repudiation of Bargaining Representatives: An Appraisal of Existing Restrictions*, 66 YALE L.J. 223, 224 (1956).

⁶⁸Ch. 372, 49 Stat. 449 (1935)(current version at 29 U.S.C. §§ 151-169 (1976)). See A. Cox, *supra* note 25, at 9.

⁶⁹29 U.S.C. § 159 (1976).

⁷⁰Such a result is clearly not within the scope of the NLRA. See generally Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

⁷¹See cases cited note 64 *supra*.

⁷²Compare *Automated Business Systems v. NLRB*, 497 F.2d 267 & n.1 (6th Cir. 1974) and *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 501-03 (5th Cir. 1972) with cases cited note 64 *supra*.

⁷³See, e.g., *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 307 (9th Cir. 1978) (union processed no grievances in years preceding refusal, no employees attended union meeting when called; union agents inspected the premises infrequently); *Peoples Gas System, Inc.*, 214 N.L.R.B. 944, 946, *rev'd sub nom. Teamsters Local Union 769 v. NLRB*, 532 F.2d

ship may create the appearance of industrial stability inasmuch as it is unlikely to give rise to strikes or other economic warfare, the intent of the statute is to protect only that industrial stability resulting from actual collective bargaining with the employees' chosen representative.⁷⁴ Thus, to the extent the Board's presumption preserves bargaining relationships other than those envisioned by the statute, it cannot legitimately be based upon preservation of the status quo.

There is some evidence that the Board is also relying on a fourth rationale: punishment of employers who would base refusals to bargain on spurious grounds out of anti-union motives.⁷⁵ Because the rationale of the NLRA is remedial, punishment of "bad" employers is not within the policy scope of the Act,⁷⁶ and thus beyond the power of the Board.⁷⁷

The Effect of the Presumption of Majority

Because the bases of the Board's presumption are weak, only a minimum of evidence should be required to rebut it. That the presumption instead effectively places the burden of disproving majority status on the employer,⁷⁸ by allowing the General Counsel to rely solely on the presumption to establish majority,⁷⁹ suggests that present Board rules are not only unfair, but in violation of the spirit of Federal Rule of Evidence 301.⁸⁰ Rule 301 states that a presumption imposes on the party

1385, 1389 (D.C. Cir. 1976) (union agreed to submit to any contract acceptable to management); *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 547 (7th Cir. 1970) (union failed to process grievances, recommend employees for promotion or super-seniority, or perform safety inspections); *Dixie Gas Co.*, 151 N.L.R.B. 1257, 1258 (1965) (no communications from union for over two years).

⁷⁴ It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing

⁷⁵ 29 U.S.C. § 151 (1976); see notes 72-73 & accompanying text *supra*.

⁷⁶ *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *A. W. Thompson, Inc.*, 449 F.2d 1333, 1337 (5th Cir. 1971); *General Electric Co. Battery Prod., Cap. Dep't v. NLRB*, 400 F.2d 713, 730 (5th Cir. 1968); *C & C Plywood Corp.*, 163 N.L.R.B. 1022 (1967); see *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 502 (5th Cir. 1972).

⁷⁷ *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940).

⁷⁸ 29 U.S.C. § 160(c) (1976) (authorizes only "such affirmative action . . . as will effectuate the policies of this subchapter . . ."); *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533 (1943); see *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493 (1972); cf. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1969).

⁷⁹ See *Peoples Gas System, Inc.*, 238 N.L.R.B. No. 143 slip op. at 9, 99 L.R.R.M. 1423 at 1426 (Sept. 29, 1978), *appeal docketed*, No. 78-2330 (D.C. Cir. Dec. 28, 1978).

⁸⁰ See *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297-98 (9th Cir. 1978).

⁸⁰ "A presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift to such party the burden of proof in the sense of the risk of non-persuasion" FED. R. EVID. 301. 29 U.S.C. § 160(b) (1976) requires that NLRB proceedings shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States. The Board is permitted discretion in applying such rules, *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1392 (D.C. Cir. 1976), and courts have read this section liberally, see, e.g., *NLRB v. Capitol Fish Co.*, 294 F.2d 868 (5th Cir. 1961). However, the

against whom it is directed only the burden of going forward with evidence to rebut or meet the presumption, which thereupon vanishes.⁸¹ This so-called "bursting bubble" presumption is based on the congressional view that permanently altering the burden of persuasion, as does the current Board test, gives too great a force to presumptions.⁸² Thus the Board's current approach overemphasizes the probative effect of prior majority status.

APPLICABILITY OF THE INITIAL RECOGNITION STANDARDS TO THE INCUMBENCY SITUATION

Policy Similarities

Analysis of the Board's approach in light of the policies leading to the actual majority test adopted in *Linden Lumber*⁸³ for the initial recognition situation, indicates the Board's fundamental failure to focus on resolving the issue of majority status by the speediest and most reliable means available.⁸⁴ In light of the ambiguous nature of the circumstances surrounding a union's loss of majority, an election is clearly a more reliable indicator of employee support than is a presumption.⁸⁵ There is even greater impetus for speedy resolution of such disputes in the incumbency situation than in the initial recognition context. Disputes over representation in section 8(a)(5) hearings and appeals can put the parties in an adversary position for years.⁸⁶ An election can resolve the issue in well under one year, generally within six months.⁸⁷ Furthermore, the current incumbency test has spawned division within the Board and among the circuits as to both procedural and substantive standards of majority.⁸⁸ Not only are these policy factors applicable to both situations, there are other underlying similarities the Board has ignored in its different approaches to the incumbency and initial recognition situations.

words "so far as practicable" have been construed not to allow easy escape from the congressional purpose in requiring such compliance, which is to insure greater possibility of judicial review, *General Engineering, Inc. v. NLRB*, 341 F.2d 367 (9th Cir. 1965), and the *Teamsters Local Union* court emphasized that the Board must at least address the evidentiary issues when it violates evidentiary rules. See *Sears, Roebuck & Co.*, 224 N.L.R.B. 558, 559 (1976)(relying on the rationale of *FED. R. EVID.* in dealing with a state dead man's statute).

Particularly when the congressional intent of a rule is made clear by ample legislative history, e.g., H.R. REP. NO. 650, 93d Cong., 1st Sess. 7 (1973), the Board should be bound thereby or give compelling explanations for its noncompliance. But see *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978).

⁸¹FED. R. EVID. 301.

⁸²H.R. REP. NO. 650, 93d Cong., 1st Sess. 7 (1973).

⁸³See notes 23-27 & accompanying text *supra*.

⁸⁴See *Seger*, *supra* note 7, at 985-87; notes 37-40 & accompanying text *supra*.

⁸⁵See note 25 *supra*.

⁸⁶E.g., *Peoples Gas System, Inc.*, 238 N.L.R.B. No. 143, 99 L.R.R.M. 1423 (Sept. 29, 1978), *appeal docketed*, No. 78-2330 (D.C. Cir. Dec. 28, 1978)(awaiting second appearance before court of appeals, five years after refusal to bargain).

⁸⁷See *Linden Lumber Div., Summers & Co. v. NLRB*, 419 U.S. 301, 306-07 (1974).

⁸⁸See notes 39-54 & accompanying text *supra*.

The underlying statutory policies the Board must weigh are the same: protection of employees' right to choose a bargaining representative, encouragement of the collective bargaining process, and preservation of industrial stability.⁸⁹ Making a union less vulnerable to repudiation after it has had a chance to demonstrate its efficacy and consolidate its membership produces an anomaly: unions are given minimal protection at the inception of the bargaining relationship, when they are most vulnerable, and maximum freedom from rejection after employees have had the opportunity to evaluate the union's performance.

Factual Similarities

Not only are the policies governing resolution of such majority disputes identical, factual similarities of the situations also militate for uniform treatment. Both involve a union majority at some prior point, demonstrated informally or by Board election; a union's demand for bargaining; and an employer's refusal to do so.⁹⁰ Furthermore, the underlying question of the actual majority of the union claiming representative status is the same in both situations.⁹¹ These similarities suggest that an approach more closely parallel to the initial recognition tests would be more appropriate to determine actual majority support than the present incumbency situation tests.

NEW APPROACHES TO THE REFUSAL TO BARGAIN WITH AN INCUMBENT UNION

An election is the most reliable and fastest method of determining the majority status of an incumbent union following an employer's refusal to bargain.⁹² However since fears exist that anti-union employers would abuse the unrestricted right to elections,⁹³ an employer must currently satisfy the "reasonable doubt" test before he may obtain an election.⁹⁴ While this test is inappropriate and difficult to administer, an employer's ability to destroy union support by independent unfair labor practices (such as discriminatory discharge of union adherents), justifies setting some threshold criteria for obtaining an election.

Limiting availability of elections by the *Gissel* test,⁹⁵ which would

⁸⁹See Note, *NLRB v. Gissel Packing Co.: Bargaining Orders and Employee Free Choice*, 45 N.Y.U.L. REV. 318 (1970); *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 501 (5th Cir. 1972).

⁹⁰See *Automated Business Systems v. NLRB*, 497 F.2d 263, 267 n.1 (1974).

⁹¹See notes 23, 37-40 & accompanying text *supra*.

⁹²See note 25 *supra*.

⁹³U.S. Gypsum, 157 N.L.R.B. 652 (1966); see S. REP. NO. 105 PT. 2, 80th Cong., 1st Sess. 10-11 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 473-74 (1948).

⁹⁴U.S. Gypsum, 157 N.L.R.B. 652, 656 (1966).

⁹⁵*NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-15 (1969) (now applied only in initial recognition situation).

order bargaining only when independent employer unfair labor practices have precluded a fair election, would obviate this danger. An employer who refrains from independent unfair labor practices could thus refuse to bargain, requiring the union to test its majority in an election.⁹⁶ This standard might initially appear to give a union little protection from the expense of repetitious elections; however, the expense of an election is likely to be as great to an employer as it is to a union, possibly greater considering the amount of time away from the job such campaigns often involve. Because the vast majority of NLRB elections take place in small shops⁹⁷ where the economic power of the employer is not great, many such employers will be unwilling to face the expense of repeated elections unless their anti-union motivation is very strong, in which case present NLRB remedies are also likely to be ineffective.⁹⁸ Furthermore, by applying bargaining orders to remedy independent unfair labor practices sufficient to impair election results, the Board would eliminate employers' incentive to request elections in the hope of using the election campaign to undermine the unions' majority through illegal activity.⁹⁹

Equally questionable is the assumption that frequent¹⁰⁰ elections would produce industrial instability. Principles of industrial democracy are central to the national labor policy,¹⁰¹ and a political model of representation has long been accepted by the Board and courts.¹⁰² Implicit in that model is periodic rejection or reaffirmation of the representative. Instability does not result from the orderly invocation of this process, but rather from its abrogation.¹⁰³

⁹⁶See Seger, *supra* note 7, at 999 n.167.

⁹⁷For all types of NLRB supervised elections in 1977 the average number of employees voting per establishment was 53, and three-fourths of all collective bargaining and decertification elections involved 59 or fewer employees. 42 NLRB ANN. REP. 20 (1977).

⁹⁸Some employers are ideologically opposed to unions and would under no circumstances recognize a union . . . [these] employers realize that the unfair labor practice and litigation routes are the most efficacious means . . . [of keeping the union out].

In cases involving such employers, *Joy Silk* bargaining orders are inadequate remedial devices. In roughly one-third of the *Joy Silk* cases examined in this study, unions were unsuccessful in obtaining contracts, primarily because of their inability, following employer unfair labor practices, to regain support among employees.

Wolkinson, *supra* note 27, at 33.

⁹⁹See note 18 & accompanying text *supra*.

¹⁰⁰It is important not to overestimate the frequency with which such elections could occur. Present Board policy bars repudiation of a union, absent the exceptional circumstances outlined in note 29, *supra*, during the term of an existing collective bargaining contract. R. GORMAN, BASIC TEXT ON LABOR LAW 9 (1976); Freidin, *The Board, the "Bar" and the Bargain*, 59 COLUM. L. REV. 61 (1959). Two-thirds of such contracts currently negotiated have a duration of three years, and approximately one-fourth have a duration of two years. LAB. REL. Y.B.—1977 at 449.

¹⁰¹Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556 (1945).

¹⁰²*Brooks v. NLRB*, 348 U.S. 96, 99 (1954); see *NLRB v. Century Oxford Mfg. Corp.*, 140 F.2d 541, 542-43 (2d Cir. 1944), *cert. denied*, 323 U.S. 714 (1944).

¹⁰³See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969); *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705-06 (1944); Brooks, *Stability Versus Employee Free Choice*, 61 CORNELL L. REV. 344, 366-67 (1976).

A less radical approach would be to continue to use unfair labor practice proceedings, but to focus strictly on the issue of majority status, rather than questions of employer doubt.¹⁰⁴ The approach formulated by the Board in *Stoner Rubber Co.*,¹⁰⁵ wherein the presumption of continuing majority support shifts only the burden of going forward with evidence to rebut the presumption, is preferable to the current Board test: it shifts the focus of the dispute to the actual majority issue,¹⁰⁶ and it allocates the burden of proving the issue to the party with the best access to the evidence.¹⁰⁷ Not only is this allocation of the burden more fundamentally fair, it conforms to the spirit of Federal Rule of Evidence 301.¹⁰⁸

Promulgation of Board rules on which employers could rely, outlining the objective indicia sufficient to rebut the presumption, would lead to greater stability in bargaining relationships by decreasing the present uncertainty as to evidentiary standards. Such rules would not only facilitate voluntary compliance, but to the extent they afford greater predictability of outcomes, would encourage settlement of disputes among the parties themselves.¹⁰⁹

The least satisfactory substitute for the current test would be retention of a modified reasonable doubt test. By lowering to "some" the amount of evidence required to establish a reasonable doubt, and limiting the effect of production of such evidence to obtaining an election, the Board would be able to screen groundless claims in representation hearings¹¹⁰ and still leave determination of the majority issue to an election. However, to the extent that this approach conditions the availability of an election on the result of an employer doubt test it suffers from all the problems of the current test.

Alternative tests of an incumbent's majority increase in desirability as they move from the uncertainty of a state-of-mind test to objective indications of actual majority. An election is the most reliable and fastest of such indications and therefore is the preferable route.

CONCLUSION

Because National Labor Relations Board bargaining orders are "strong medicine"¹¹¹ to remedy an employer's refusal to bargain, their

¹⁰⁴See *Seger*, *supra* note 7, at 978-89.

¹⁰⁵123 N.L.R.B. 1440 (1959).

¹⁰⁶See notes 36-40 & accompanying text *supra*.

¹⁰⁷See notes 60-63 & accompanying text *supra*.

¹⁰⁸See notes 80-82 & accompanying text *supra*.

¹⁰⁹*Cf.* SEC Release No. 33-5487, 39 Fed. Reg. 15,261 (1974) (Notice of Adoption of Rule 146 under the Securities Act of 1933; "[s]uch a rule should reduce uncertainty to the extent feasible and provide more objective standards upon which responsible businessmen may rely . . . in a manner that complies with the requirements of the Act."). NLRB reluctance to promulgate such rules is near legendary, however, and it is unlikely the Board will resort to the rule-making process. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 6.08, at 152 (1972); Peck, *The Atrophied Rule-Making Powers of the NLRB*, 70 YALE L.J. 729 (1961).

¹¹⁰See 42 NLRB ANN. REP. 7 (1977).

¹¹¹*NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965).

use in situations where a union seeks initial recognition has been limited to cases in which the employees' power to choose a bargaining representative in an election has been precluded by an employer's unlawful activity. When an employer commits no acts which would impair an election, an election is the favored method of determining majority status because it ensures greater reliability, speed, administrative efficiency and less party hostility than does an unfair labor practice proceeding.

Retention of a doubt test when an employer refuses to bargain with an incumbent union on grounds of loss of majority has led to confused evidentiary standards and a failure to focus on the crucial issue of actual majority status. Furthermore, the bases for the presumption of continuing majority are exceedingly weak, and the operation of the presumption violates the spirit of Federal Rule of Evidence 301.

The current Board approach stems from a laudable desire to protect unions from harassment by anti-union employers seeking to undermine union support. Adoption of a test similar to that used in the initial recognition situations, would not, however, subject unions to undue harassment. The shift in focus from a search for employer doubt to resolution of the issue of the union's actual majority by the most reliable and speediest means available would also be in greater harmony with the underlying policies of the NLRA. Less drastic cures of the present situation might alleviate some of the unfairness and confusion generated by the current approach, but would fail to deal fully with the problems of reliability, speed and violation of the policies of the NLRA.

Only through the establishment of fair and evenhanded procedures whose meaning can be clearly understood by the parties can the Board settle majority disputes promptly and reliably, and thus encourage voluntary settlement of such disputes by the parties themselves; this is the real industrial stability ultimately envisioned by the National Labor Relations Act.

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